No. 87-1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII; ALBERT TOM, *Chairman;* SUNAO KIDO, *Commissioner; and* RUSSEL S. NAGATA, *Director of the Department of Commerce and Consumer Affairs, State of Hawaii, and Consumer Advocate,*

Petitioners,

v.

HAWAIIAN TELEPHONE COMPANY, *a Hawaii Corporation,*

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

Our petition shows the lower court's decision[1] overturning Hawaii Public Utilities Commission (PUC) orders in Docket 4588, and guaranteeing respondent (HawTel) an intrastate rate of return of 11.25 per cent, instead of the 10.15 per cent the PUC granted, eviscerates the Johnson Act (Pet. 17, 20-22); misconstrues the effect of the Communications Act and the FCC's 1981 separations order (*id.* 17-22); and misapplies 47 U.S.C. § 401(b), placing the Ninth Circuit in conflict with the First (Pet. 18-19). The lower court also erred more basically: one, by misperceiving the state court affirmance in Docket 4306 (Haw. appeal No. 9343, Pet. App. 66) (*HawTel I*), and ignoring the dismissal of HawTel's appeal in Docket 4588 (Haw. appeal No. 10169, Pet. App. 203-08, 213 n.1), creating not just a conflict, but a double breach of both the Full Faith and Credit Act (Pet. 22-25) and the *Feldman* doctrine (*id.* 24-25); two, on its view that litigation was open, by overlooking abstention (*id.* 25-28); and three, by violating justiciability rules that bar premature adjudication (*id.* 28-29) and overbroad remedial orders (*id.* 29-30). HawTel's defense of the decision below as "well-reasoned" and raising "no important issue" (Resp. Br. at 5, 6), proves why the writ should be granted.

HawTel labors to prove an irrelevant point. There is no dispute that by FCC order No. 81-312 "the NARUC-FCC Separations Manual . . app[ies] to Hawaii." Pet. App. 249-50. Nor need this Court reject, for state court takings cases, a claim that "Congress intended that separations

[1] The petition for rehearing below was denied on January 13, 1988. Resp. App. 1. This Court is fully authorized to act. *See FCC v. League of Women Voters*, 468 U.S. 364, 373 (1984).

orders of the Federal Communications Commission preempt inconsistent state regulation" (Resp. Br. 6, 10 n.15). That issue is not present because HawTel did not appeal to this Court from *HawTel I* (where the rate adjustment was first upheld), and abandoned state appeal No. 10169, where the PUC order here was at issue. Resp. Br. at 15 n.23. Our petition is not about state court takings cases, but about federal district courts launching preemptive strikes that make such state court litigation meaningless.

What HawTel ignores is that it follows neither from the Communications Act nor the FCC order that a federal district court may force a state commission to grant an 11.25 per cent rate of return on the federally-defined intrastate ratebase. This is particularly so when that return under state law is undeserved because revenue demands yielding the requested rate breached "understandings . . . between the State and [the utility]" whereby the utility was deemed to have agreed to subsidize intrastate rates in exchange for ratepayer support of the utility's agenda elsewhere. D&O 8042, Pet. App. 100.[2]

Nor does it follow that, having abandoned state proceedings and review here, HawTel "was entitled to 'bridge over' to the Federal system," or that comity, abstention, and justiciability "cannot foreclose direct vindication of Federal regulation in the Federal courts under Section 401(b)" (Resp. Br. 16, 18). Such "anti-comity" claims confess the decision below merits this Court's review.

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[2] *See* Order 8168, Pet. App. 51; *see also In re Hawaiian Telephone Co.*, 67 Haw. 370, 375-76 & nn.4-7, 383-84 & n.13, 689 P.2d 741, 745 & nn.4-7, 750 & n.13 (1984), Pet. App. 66, 73-74, 84 (cataloguing HawTel officers' representations). HawTel (Resp. Br. 10 n..15) egregiously misquotes our petition for rehearing (*see* Ex. D at 7, App. for Ext. of Time, No. A-424) (U.S. filed Nov. 24, 1987), which states that the separations formulas are relevant only if a state agency is seeking to avoid a taking claim by viewing the rate base "through the lens of state law." As noted, that is not going on in this action.

A. The Ninth Circuit's Decision Defies the Johnson Act and the Communications Act.

HawTel's reasons why neither the Johnson Act nor the "express jurisdictional limitations on FCC power," *Louisiana PSC v. FCC*, 476 U.S. 355, 370 (1986), barred relief, confirm that the decision here breached these limits.

HawTel devotes its brief largely to proving the importance of FCC-prescribed separations formulas (Resp. Br. 6-10 (citing, *e.g.*, *Lone Star Gas Co. v. Texas*, 304 U.S. 224 (1938); *Smith v. Illinois Bell Tel.*, 282 U.S. 133 (1930); *Minnesota Rate Cases*, 230 U.S. 352 (1913); *Smyth v. Ames*, 169 U.S. 466 (1898))). While HawTel's seeming purpose is to show the formulas have force independent of their roles in a taking inquiry,[3] the effort fails. None of the cases show that a failure to apply the FCC rules, *simpliciter*, gives rise to anything other than a claim to redress an unlawful taking or breach of due process (if that). Rather, these cases refute HawTel's claim, for they involve the very attacks that can be heard originally only in state court. *See e.g.*, *Smith*, 282 U.S. at 142.

HawTel is wrong in claiming (Resp. Br. 7-9) that *Louisiana PSC* is to the contrary. *Louisiana* affirms that "distinct spheres of regulation" generate special rules in taking cases, 476 U.S. at 375, and the Court's discussion of separations should be read mainly as proving how Congress has denied federal power to regulate intrastate rates. *Id.* at 375-76. The Act, as *Louisiana* holds, does not bar a state from setting a low intrastate rate because it has misallocated interstate costs. The Taking Clause may remedy the wrong. But preemption is not a bar.

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[3] Indeed, the premise that the Johnson Act allows injunctions on preemption claims relies on the flawed idea of a "two tiered system of constitutional rights." *Memphis Community School Dist. v. Stachura*, 106 S. Ct. 2537, 2544 (1986)

The most serious flaw in HawTel's reasoning, however, is its notion that intrastate rates are nullified, no matter what justifications support them, if they have " 'the effect' " of misapplying separations rules (Resp. Br. at 4), and that a court may conclude, from such a "factual finding," that stated proper purposes are not the ones motivating the agency (*id.* at 13-14).

It was error to look behind the PUC's express and facially proper findings. "[I]nquiry into legislative motive is often an unsatisfactory venture"; thus a state's "avowed purpose" in a preemption case is to be taken at face value. *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190, 216 (1983). That purpose here was to avoid injustice threatened when HawTel, having gotten State support for the AT&T agreement by implying it would use transition funds to subsidize intrastate rates, then asked for large intrastate increases. *Supra* note 2. These reasons should have ended the case. *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242-43 (1984).

Instead, the district court altered D&O 8042 to create a federal issue, transforming a rate of return adjustment into a rate base adjustment. The court below compounded the error by viewing the "predominantly legal" issue of preemption, *Pacific Gas*, 461 U.S. at 201, as one of fact. In short, HawTel may have had a taking claim, but its remedy was to seek review in state court and on appeal here. The adage "that 'two wrongs do not make a right.' " *Gray v. Mississippi*, 107 S. Ct. 2045, 2054 (1987), should have kept the courts below out of the fray. Certiorari should issue to correct this evasion of the Johnson Act and the lower court's erroneous preemption analysis.

The mischief below also shows why HawTel's claims should not have been heard because jurisdiction was absent under 47 U.S.C. § 401(b). HawTel's wrong view of the PUC's decision as "a collateral attack on . . . the FCC's 1981 order" and improper claim that the courts below

"acted to enforce the Federal order" (Resp. Br. 13) support the holding that Congress neither placed "interpretation of [a] rule's scope and meaning . . . in the hands of private parties and some 700 federal district judges," nor allowed "issue splitting," such as that here, occasioned when litigants carve rule-based preemption claims out of state proceedings. *New England Tel. & Tel. Co. v. PUC*, 742 F.2d 1, 6-7 (1st Cir. 1984), *cert. denied*, 476 U.S. 1174 (1986). HawTel's claims supporting § 401(b) jurisdiction were all rejected by the First Circuit. HawTel offers no reason why this conflict ought not be reviewed.

B. The Ninth Circuit Should Have Reversed the Injunction Under Precepts of Comity, Abstention, and Justiciability.

1. Relitigation was Barred.

HawTel has no good answer to the claim that refusal to bar relief given the affirmance in PUC Docket 4306 (Haw. appeal No. 9343) (*HawTel I*), or the order dismissing appeal in Docket 4588 (Haw. appeal No. 10169) defied the rule that "a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give," *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (citing cases). HawTel's response is the startling claim that preclusion is inapplicable when a litigant pursues "direct vindication of Federal regulation in the Federal courts under Section 401(b)" (Resp. Br. 18). Nothing HawTel cites supports this.

HawTel I's effect raises state law issues that ought be decided by courts familiar with them. The panel did not address these issues, however, and when, as here, a federal court does not acknowledge state law controls, this Court grants review and remands. *Parsons Steel*, 474 U.S. at 526; *Marrese v. American Academy*, 470 U.S. 373, 386-87 (1985); *Migra v. Warren School Dist.*, 465 U.S. 75, 87 (1984). Because state law may moot the federal issues

here, the Court may wish to certify the issue of *HawTel I*'s effect under Haw. R. App. P. 13, or remand to the court below and instruct it to do so. *Virginia v. American Booksellers Ass'n*, 56 U.S.L.W. 4113, 4117 (U.S. Jan. 25, 1988) (citing *Bellotti v. Baird*, 428 U.S. 132 (1976)).

HawTel's discussion of its forfeited appeal in No. 10169 counsels the same result if not reversal. HawTel concedes it "appealed D&O 8042 to the Hawaii Supreme Court, [and] the appeal was dismissed . . . before the district court took any substantive action" (Resp. Br. 15). HawTel has no response to our claim that the order of dismissal is *res judicata*. Although HawTel presented "only state law grounds" on appeal, (Resp. Br. 16), state law condemns the claim splitting HawTel seeks.[4]

State law aside, relief is barred since the courts below had "no authority to review final judgments of a state court in judicial proceedings." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1982). Suggesting *Feldman* is inapt since "[r]atemaking is . . . legislative" (Resp. Br. 17), HawTel ignores that the judgments upset are those of our state supreme court. The claims HawTel litigated in *HawTel I*, and could have pursued, but forfeited, in appeal No. 10169, required a *court* "to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' " 460 U.S. at 479. Even if one wrongly assumes *HawTel I* does not work as a bar, HawTel's failure to seek rulings on federal claims in appeal No. 10169 "forfeited [its] right to obtain review . . . in any federal court." 460

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[4] *Santos v. State*, 64 Haw. 648, 652, 646 P.2d 962, 965 (1984) (citing cases); *Lundberg v. Stinson*, 5 Haw. App. 394, 399-400, 695 P.2d 328, 333-34 (1984). HawTel also provides no answer how *University of Tennessee v. Elliott*, 106 S. Ct. 3220 (1986), does not bar review of the PUC findings, concerning, *e.g.*, HawTel's representations or the benefits flowing from the AT&T agreement.

U.S. at 484 n.18. Given this glaring jurisdictional defect, HawTel's losses and forfeitures doubly counsel review here.

2. The Grouds for Abstention Were Compellingly Present.

HawTel's reasons why, *if* relitigation was not barred, abstention was not required, are patently wrong. The notion that abstention was waived (Resp. Br. 14 & n.22) is meritless. Petitioners pleaded comity defenses (Pet. App. 196), and urged abstention in the district court (*id.* 209), in the court below in Johnson Act claims, and in the petition for rehearing (Resp. Br. 14 n.22). *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718, 2722 (1986), where abstention, argued to the district court, was not raised until oral argument here, bars a waiver a fortiori. As argued in our petition for rehearing below, and here (Pet. 25-26) since we have throughout attacked jurisdiction and relitigation, if those attacks lack merit a federal court is bound "to decide the propriety of a federal court injunction under the general principles of equity, comity, and federalism."[5]

HawTel's claim that *Younger* is "wholly inapplicable" to its claims (Resp. Br. 17) is untenable. The Johnson Act does not exhaust "principles of federal equity." *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 525-26 n.33 (1981); *Alabama PSC v. Southern Ry. Co.*, 341 U.S. 341, 350 (1951). The claim that *Younger* is inapt because ratemaking is not "adjudicatory" (Resp. Br. 17) ignores state law,

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[5] *Parsons Steel*, 474 U.S. at 526; *see Dayton*, 106 S. Ct. at 2722; *Hickey v. Duffy*, 827 F.2d 234, 238 (7th Cir. 1987). *Pullman* (and *Burford*) are not waivable. *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480 n.11 (1977).

HawTel's waiver arguments are further diminished insofar clarification that *Younger* applies to agency proceedings, *Dayton*, and the "types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1526 n.9 (1987), occurred after this case was first submitted. *See St. Louis v. Parapotnik*, 56 U.S.L.W. 4201, 4203-04 (U.S. Mar. 2, 1988).

Haw. Rev. Stat. § 269-16(b) (Pet. App. 226), and *Dayton*'s rule that agency processes vindicating regulatory interests are subject to *Younger*. Indeed, HawTel admits state *judicial* proceedings had commenced "before the district court took any substantive action" (Resp. Br. 15). *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984). HawTel all but concedes it did not escape *Younger* by aborting its appeal (*see* Pet. 27), and, while viewing charitably its own conduct, does not really deny that important state interests are present (Resp. Br. 17).

HawTel's claim that *Burford* is inapt because relief here left "unaffected" our "scheme for review" (Resp. Br. 15), is even flimsier. If further state review of HawTel's preemption claim was not barred, a run to federal court clearly "disrupts [the] state's effort for review" (Resp. Br. 15) by making those available processes pointless. HawTel, moreover, misstates *Burford* as protective of state procedures and nothing more. The doctrine at its core insulates "basic problems of [state] policy," when, and if, as here, the state provides "a unified method for the formation of policy and determination of cases." 319 U.S. at 332, 333; *see Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 122 n.32 (1984); *Colorado River District v. United States*, 424 U.S. 800, 815 (1976). On HawTel's own view, the federal issue here, like the taking claim in *Alabama PSC v. Southern Rv. Co.*, 341 U.S. 341 (1951), depends on a "predominantly local factor," *id.* at 347, namely whether the rate reduction reflected Hawaiian precepts of good faith and fair dealing (*see* Resp. Br. 14). *Burford* requires this policy issue to be heard, if at all, in state court.[6]

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[6] That HawTel might have persuaded the state court that the adjustment was not justified under Haw. Rev. Stat. 269-16(a), suggests, as Judge Ferguson argued, Pet. App. 35 n.2, that a *Pullman* stay also was warranted. *Pennzoil*, 107 S. Ct. at 1526 n.9.

HawTel thus offers no good argument against abstention. Since the very important *Pennzoil* decision was not handed down until after the case was submitted, this Court may wish to grant the petition, and remand for further proceedings. *See Yates v. Aiken*, 108 S. Ct. 534, 536 (1988). In any case review should be granted to effect comity doctrines that have long barred frustration of regulatory regimes such as those here.

3. Article III Barred Relief.

Given the "special obligation" to notice jurisdictional defects, *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986), HawTel does little to rebut our claim that the relief here was both premature, and overbroad (Pet. 28-30). Both defects are clearly present.

HawTel papers over ripeness defects by confusing ripeness with exhaustion of remedies (Resp. Br. 14 & n.22). *Williamson County v. Hamilton Bank*, 473 U.S. 172 (1985), defines ripeness as a discrete hurdle. The issue is not whether the PUC decision was "unlawful or otherwise inappropriate," but "whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," *Id.* at 193. Here, the panel reshaped HawTel's claim as one about the post-1985 effects of the intrastate tariff (Pet. App. 21-22). But in transposing the issue to "this new setting" (*id.*), the panel overturned an order the PUC did not issue, *i.e.*, one rejecting a claim that HawTel in 1985 would so suffer that the rate reduction ought be abated. This claim was not addressed in Docket 4588 since HawTel did not adduce proper evidence (Pet. App. 55, 102-03). There was no "meaningful application." *MacDonald v. Yolo County*, 106 S. Ct. 2561, 2568 n.8 (1986). *See also Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4170-71 & nn.5, 7 (U.S. Feb. 24, 1988).

HawTel's claims also prove the lower courts went too far. Even if all it argues is true, and all else we claim is

wrong, HawTel is entitled only to a ban on "use [of] interstate revenues to reduce the intrastate revenue requirement" (Resp. Br. 8). It is not entitled to a set return, for the PUC may properly reevaluate costs "assigned to the intrastate jurisdiction" (*id.* 10), or clarify its order so not even HawTel could complain. *Pacific Gas*, 461 U.S. at 216. States " 'should be preempted . . . "only to the extent necessary" '." *DeCanas v. Bica*, 424 U.S. 351, 358 n.5 (1976). The Act does not require States, acting in their sphere, to grant "sufficient revenues," let alone an 11.25 per cent return. *Louisiana*, 475 U.S. at 376.

CONCLUSION

For the reasons above and those presented in the petition for certiorari, the writ should be granted.

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